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Supreme Court, U.S.
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No. 08-408

In the
Supreme Court of the United States

ELLIOT CUNNINGHAM, *Petitioner*

V,

STATE OF INDIANA,

ON PETITION FOR WRIT OF CERTIORARI
TO THE INDIANA STATE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant has Fifth Amendment Rights against self-incrimination in what has been defined as a quasi-criminal trial.

2. Whether the trial court erred in not notifying Defendant Elliott Cunningham of his Miranda Rights.

3. Whether the trial court erred when ordering Cunningham to testify against himself, during a deposition/discovery that was conducted by a deputy prosecutor for a quasi-criminal trial.

4. Whether the deputy prosecuting attorney was required to stop questioning/interrogating Cunningham, when Cunningham invoked his Fifth Amendment privilege during the court ordered deposition.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

The opinion from the Indiana Court of Appeals in this case, unpublished No. 45A03-0705-CV-210 March 4, 2008 see Appendix (A).

The judgment of the Lake County Superior Court, Civil Division, Room No. 6. Sitting at Crown Point, Indiana. No. 45D10-0604-IF-1 March 15, 2007 see Appendix (B).

The decision of the Indiana Supreme Court, denying appellant's petition to transfer of jurisdiction May 15, 2008 see Appendix (C).

The opinion from the Indiana Court of Appeals in Cunningham's first appeal Cunningham v. State of Indiana, Co. 730 N.E.2d at 169 (Ind. Ct.) for publication. October 25, 2005 see Appendix (D).

JURISDICTION

The judgment of the trial court was entered March 19, 2007. A notice of appeal was filed on April 5, 2007, and the case was docketed in the Indiana court of appeals on August 8, 2007. The petition to transfer jurisdiction to the Indiana Supreme Court was docketed on 3-25-2008. The Indiana Supreme Court denied transfer on May 15, 2008. The Petition for Writ of Certiorari was mailed to the U.S Supreme Court Clerk on August 12, 2008. The Jurisdiction of the court is invoked under U.S. Supreme Rules, Part III, 10 (c) and also invoked under 28 U.S.C 1225 (a) Furthermore, the question of jurisdiction can also be predicated on the U.S Constitution, Article III.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution Ind. Code 34-28-5-1(a)

STATEMENT OF THE CASE

This was Cunningham's second trial court appeal in this cause. During the first appeal, the Indiana Appeals Court reversed and remanded a guilty verdict from the first bench trial because Cunningham was denied a jury trial. Cunningham v. State of Indiana 730 N.E.2d at 169 (Ind. Ct. App.2005) see Appendix (D). With this second appeal Cunningham appealed a jury trial's guilty verdict predicated on the trial court's ruling denying Cunningham his Fifth Amendment to the United States Constitution including but not limited to Due Process and Miranda v. Arizona, 384 U.S. 436 (1966) in a quasi-criminal trial and subsequently ordering Cunningham to submit to Lake County Deputy Prosecutor's request to take Cunningham's deposition violating Cunningham's Fifth Amendment to the United States Constitution privilege against self-incrimination which was a blanton violation of Miranda v. Arizona, 384 U.S. 436 (1966). On March 7, 2007 the trial court overruled ruled Cunningham's vehement written and oral objections "The Court: "All of your objections are noted and overruled, Mr. Cunningham. You are to submit to a deposition today, immediately following the adjournment of today's proceedings." Even though Cunningham

evoked his Fifth Amendment to the United States Constitution privilege against self-incrimination emphatically and unequivocally throughout the pre-trail hearing and again during the deposition/interrogation to no avail.

ARGUMENT

On March 9, 2007, the State of Indiana filed additional discovery solely based on Cunningham's interrogation taken from his forced deposition violating Cunningham's Fifth Amendment to the United States Constitution privilege against self-incrimination and Due Process Rights. Although Cunningham clearly believes that the Fifth Amendment to the United States Constitution against self-incrimination is not only relevant in these types of cases, but it is readily transparent that there was a concerted effort to knowingly and with malice to violate Cunningham's fundamental rights to Due Process and a fair trial by the prosecution in concert with the trial judge. The Indiana Appeals Court ruled in Cunningham v. State of Indiana Co. 730 N.E.2d at 169 (Ind.Ct. App.2005) citing, State v. Hurst, 688 N.E.2d.402, 405 (Ind.1977). "Though they are now governed by the Indiana Rules of Trial Procedure, speeding infractions remain quasi-criminal in nature,"—"they are enforced by the police; Complaints are initiated and litigated

by a prosecuting attorney on behalf of the State, citing Ind. Code 34-28-5-1(a) and violators are fined by the government. Because of this, it logically follows that, just as criminal actions were outside the scope of equitable actions as provided by our case history, and so too, would quasi-criminal actions have been historically non-equitable see Appendix D. This defendant asserts most adamantly that whenever the police and prosecutors are involved in an enforcement action representing the State, defendants must be able to assert their Fifth Amendment to the United States Constitution privilege against self-incrimination without question. Furthermore, because this deposition/interrogation was clearly forced and coerced and because Cunningham was court ordered to immediately subject himself to the prosecution's interrogation, this was a clear violation of Miranda v. Arizona, 384 U.S. 436 (1966), and Due Process, including the Fairness Doctrine, because Cunningham did not have the ability or the freedom to simply stop this interrogation or leave, or refuse questions, Cunningham was clearly and literally being detained against his will. Even though Cunningham evoked his Fifth Amendment to the United States Constitution privilege against self-incrimination emphatically and unequivocally throughout the pre-trail hearing and again during the deposition/interrogation to no avail. "If the individual indicates, prior to or during

questioning, that he wishes to remain silent, the interrogation must cease." Miranda v. Arizona, 384 U.S. 436 (1966). In the absence of other effective measures, the following procedures to safeguard the Fifth Amendment privilege must be observed: The person in custody must, prior to interrogation, be clearly informed that the has the right to remain silent, and that anything he says will be used against him in court; Miranda v. Arizona, 384 U.S. 436 (1966). During the hearing held on March 7, 2007 the Court: "Do you intend to testify at trial, Mr. Cunningham?" Mr. Cunningham: "I would like to state emphatically that I have a right to the Fifth Amendment and that is all I have to say." A defendant's 5th Amendment protections apply wherever and whenever an individual is compelled to testify. The U.S. Supreme Court has ruled that the privilege against self-incrimination applies whether the witness is in Federal or State Court see Malloy v. Hogan, 378 U.S. 1 (1964), and whether the proceeding itself is criminal or civil see McCarthy v. Arndstein, 266 U.S. 34 (1924).

THE TRIAL COURT FAILED TO NOTIFY DEFENDANT OF HIS MIRANDA RIGHTS

Cunningham contends that the Trial Court is mandated to give defendant the following rights before Trial. 1. The right to exercise his Fifth

Amendment to the United States Constitution privilege against self-incrimination. 2. The right to an appeal. 3. The right to an attorney and if the defendant cannot afford an attorney then one will be appointed at no cost. The State asserts that these rights may not be applicable to Cunningham's quasi-criminal proceedings. To the contrary, Cunningham contends that because he was charged with Class "C" speeding infraction, Miranda Rights should be applied because Cunningham's trial was a quasi-criminal proceeding, as cited in Cunningham v. State of Indiana 730 N.E.2d at 169 (Ind. Ct. App.2005) "speeding infractions remain quasi-criminal in nature" see Appendix D. Thus Cunningham was entitled to the Miranda Rights as a manner of course. The privilege against self-incrimination, which has had a long and expansive historical development, is an essential mainstay of our criminal adversarial system, and guarantees to the individual the "right to remain silent unless he chooses to speak in the unfettered exercise of his own will," during a period of custodial interrogation as well as in the courts or during the course of other official investigations. May I remind this Court that defendant Elliott Cunningham was subjected to a court order which forced him to testify against himself. Cunningham evoked his Fifth Amendment to the United States Constitution privilege against self-

incrimination emphatically and unequivocally throughout the pre-trail hearing and again during the deposition/interrogation to no avail.

REASONS FOR GRANTING PETITION

This Court should grant defendant's Petition for Writs of Certiorari for the following reasons:

First and foremost the defendant Elliott Cunningham was subjected to the trial court's arbitrary abuse of judicial misconduct that if allowed to stand would be contrary to the basic U.S. Constitutional Rights that are inherent to Hoosiers as well as all Americans in general who have stood for and indeed have died for on numerous occasions throughout our history. The U.S. Constitutional 5th Amendment Rights including but not limited to Due Process and Miranda v. Arizona, 384 U.S. 436 (1966) should be protected at all costs, with minimal regard to any other factors. The mere thought of a trial court denying basic constitutional rights that have been established by Congress and mandated by the U.S. Supreme Court for decades should be incomprehensible as well as unconscionable and a travesty to equal justice for all citizens of this great Nation.

Furthermore, this Court has judicial discretion when there is a conflicting ruling within the same appeals court. The Indiana Appeals Court is divided. The Indiana Appeals Court: "We review purely legal issues de novo." Cunningham v. State of Indiana 730 N.E.2d at 169 (Ind. Ct. App.2005) "speeding infractions remain quasi-criminal in nature" see Appendix D. This Indiana Appeals Court decision was predicated on a purely legal issue to wit: Whether defendants in quasi-criminal trials have a Constitutional Right to a Jury Trial (see Appendix D) defendant's second appeal to the same Indiana Appeals Court was predicated also on purely legal issues. Whether defendant is in a quasi-criminal trial and has a U.S. Constitutional 5th Amendment Right including but not limited to Due Process and Miranda v. Arizona, 384 U.S. 436 (1966) for infractions that are quasi-criminal in nature. Both Appeals to the same Indiana Appeals Court were predicated on purely legal issues of first impression but the same Indiana Appeals Court rendered conflicting rulings, the right to a jury trial as purely legal issue, as is whether a defendant has U.S. Constitutional 5th Amendment Rights including but not limited to Due Process and Miranda v. Arizona, 384 U.S. 436 (1966) but did not afford the same remedy, and the Indiana Supreme Court refused to review see Appendix C. Cunningham is requesting the U. S. Supreme Court to decide whether a defendant can assert his Fifth Amendment Rights

against self-incrimination in a speeding infraction, quasi-criminal trial. This Court should grant Cunningham Writ of Certiorari because the Indiana Court of Appeals erroneously concluded that Cunningham's argument regarding his Fifth Amendment Rights were not cogent because Cunningham failed to provide citations to relevant authorities or record of appeal. Cunningham asserts that there are no such relevant authorities or record of appeal in the State of Indiana because Cunningham's assertion that his Fifth Amendment Right against self-incrimination was violated is a case of first impression and predicated on purely legal issues. An issue presented on appeal is a pure question of law when the question does not require reference to extrinsic evidence, inferences drawn from that evidence, or the consideration of credibility questions. Bader v. Johnson, 732 N.E.2d 1212, 1216 (Ind. 2000). We review purely legal issues de novo. LaRose v. State, 820 N.E.2d 727, 730 (Ind. Ct. App. 2005), trans. denied see Appendix D. This case presents issues of fundamental national importance. Not only is this case immensely important for the State of Indiana so as to resolving a conflicting decision within the Indiana Appeals Court but for this great Nation. This particular case is not a one time event nor can it be somehow attributed to an anomaly in our justice system. To the contrary, our legislators, courts and in particular prosecutors throughout

our entire nation are systematically and routinely and most brazenly continue to violate our most basic fundamental rights that are guaranteed under our U.S. Constitution. Most importantly these legislators, courts and in particular prosecutors, from Indiana to Alabama to California and Alaska, will continue to usurp and undermined this precious instrument of freedom until this U.S. Supreme Court has ruled on this case. Furthermore, this Indiana ruling should be over turned in order for the U.S. Supreme Court to re-establish rule of law concerning the U.S. Constitutional Fifth Amendment Rights including but not limited to Due Process and Miranda v. Arizona, 384 U.S. 436 (1966) for infractions that are quasi-criminal in nature for the entire Nation.

CONCLUSION

Without exception we must be vigilante and unrelenting in our quest to maintain and protect our freedoms and rights that our forefathers established with their most exceptional intellect, exquisite writing and indeed their blood.

When this type of injustice does occur, the sanctions should be severe and unequivocal to serve as deterrent to all trial courts and prosecutors who may consider such catastrophic actions. I say to all, as a proud American Citizen whose fundamental constitutional rights were summarily and vindictively subjugated to the trial court's total and deviant disregard for what

this Nation stands for. The defendant, Elliott Cunningham, implores the U.S. Supreme Court to fully comprehend the magnitude of this trial court's rulings because not only were the defendant's constitutional rights become literally non-existent, so did the constitutional rights of all the citizens of the United States of America who hold true the freedoms, liberties and the rights of this great nation. With a few noted exceptions this appeal is implicitly predicated on Cunningham v. State of Indiana, 730 N.E.2d at 169 (Ind. Ct. App. 2000) along with all of the ramifications and implications and rights that are guaranteed by the U.S Constitution that are inherent in such cases. The response brief of the Indiana Attorney General to the Indiana Court of Appeals is basically a veiled, backdoor attempt to overturn Cunningham v. State of Indiana 730 N.E.2d at 169 (Ind. Ct. App. 2005) see Appendix D. Throughout the Indiana Attorney General's response brief, without exception, continually asserts that Cunningham's trial was a simple civil proceeding, without regard or a hint of acknowledgement to the opinions of this Appeals Court in Cunningham v. State of Indiana 730 N.E.2d at 169 (Ind. Ct. App.2005). The State's brief to the Indiana Court of Appeals, also relentlessly asserts that assuming that the trial court erred on numerous occasions during Cunningham's trial, all errors were harmless. This is ludicrous. The Indiana Appeals Court simply ignored a first impression, purely legal

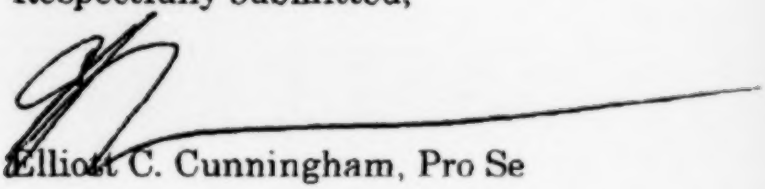
question based on the U.S. Constitutional Fifth Amendment Right including but not limited to Due Process and Miranda v. Arizona, 384 U.S. 436 (1966) predicated on whether or not the error was harmless. The mere fact that Cunningham's U.S. Constitution Rights were summarily violated is within itself harmful and subsequently a reversible error.

Cunningham asserts that each and every error by the trial court that was cited in this appeal materially damaged and significantly undermined Cunningham's defense. Furthermore, all of the aforementioned errors as well as having an insurmountable cumulative affect on Cunningham's defense also violated the basic principals of the Fairness Doctrine which is predicated on Due Process.

What happened during this trail, was not only an extreme departure from acceptable jurisprudence standards and practices, but this was a full-frontal, no holes-barred attack on the very under pinning and the basic foundation of the U.S Constitution. Therefore, I have no other choice, standing alone but to defend the U.S. Constitution earnest, and defend her I will. Elliott Cunningham, Pro Se. "It is the responsibility of the patriot to protect his country from its government." Thomas Paine. This philosophy by the prosecution of winning at all cost has been taken to its extreme and the results are wholly unacceptable and the sacrifice just too great.

For the foregoing reasons, Cunningham respectfully requests that this U.S. Supreme Court reverse the trial court's guilty verdict and reverse the Indiana Appeals Court's affirmation of that verdict with prejudice.

Respectfully submitted,



Elliott C. Cunningham, Pro Se

IN THE COURT OF APPEALS OF INDIANA

Elliott Cunningham, Appellant-Defendant, vs. State of Indiana, Appellee-Plaintiff. No. 45A03-0705-CV-210. Date of Entry: March 4, 2008.

STATEMENT OF THE CASE

Appellant-Defendant, Elliott Cunningham (Cunningham), appeals following a jury verdict against him in a trial arising from a speeding ticket.

We affirm.

ISSUES

Cunningham raises four issues on appeal, which we restate and recorder as: (1) Whether the trial court violated his Fifth Amendment privilege against self-incrimination when it ordered him to submit to a deposition; (2) Whether the trial court erred by ordering him to submit to a deposition after the discovery deadline; (3) Whether the trial court abused its discretion in denying Cunningham's motion for mistrial based on alleged prosecutorial misconduct; and (4) Whether the trial court violated Indiana Trial Rule 45(B) by granting the State's Motion to Limit the Scope of Discovery and for Protective Order.

FACTS AND PROCEDURAL HISTORY

On October 26, 2004, Detective Robert Bridgeman of Lake County Sheriff's Department

1. Bridgeman was a deputy sheriff in 2004; he became a detective in approximately 2006.

(Detective Bridgeman) observed a vehicle driving in excess of the speed limit. Detective Bridgeman stopped the vehicle and issued the drive, Cunningham, a speeding ticket. On December 7, 2004, Cunningham appeared for a bench trial in the matter and requested a jury trial. The trial court denied his request and, on December 13, 2004, entered a decision in favor of the State and ordered Cunningham to pay fines and court costs in the amount of $96.50. Cunningham appealed, claiming that drivers accused of traffic infractions are entitled to a jury trial. On October 25, 2005, we issued an opinion agreeing with Cunningham and remanding for further proceedings. *Cunningham v. State*, N.E.2d 1075 (Ind. Ct. App. 2005), *trans, denied.*

On November 9, 2006, the trial court issued an Order on Proceedings that provided, "All discovery in this case shall be completed by February 2, 2007." (Appellant's App. p.6). On November 21, 2006, Cunningham filed a subpoena *duces tecum* for the deposition of Deputy Commander William Paterson of the Lake County Sheriff's Department, requesting the production of: (1) maintenance records for the radar device used during Cunningham's traffic stop; (2) Detective Bridgeman's training records; (3) the radar device itself; (4) records of Detective Bridgeman's traffic stops on October 26, 2004; (6) records relating to the chain of custody of the radar device; and (7)

the operational and training manual for the radar device. On December 8, 2006, the State filed its Motion to Limit the Scope of Discovery and for Protective Order, asking that it not be required to provide items 2,3,4,5, or 7. On January 3, 2007, the trial court granted the State's motion.

On February 14, 2007, the State filed a notice of intent to take Cunningham's deposition. Cunningham objected based upon the Fifth Amendment to the United States Constitution and the fact that the February 2nd discovery deadline had passed. On March 7, 2007, the trial court held a hearing, overruled Cunningham's objective, and ordered him to submit to a deposition after the hearing.

A jury trail was held on March 15, 2007. The state called Detective Bridgeman, and during cross-examination, Cunningham asked Detective Bridgeman whether he remembered "the earlier trial." (Tr. P. 94). Cunningham then stated, "in fact, we went to trial a month after you gave me the ticket." (Tr. P. 95). During re-direct examination, the prosecutor asked Detective Bridgeman, "Do you have a recollection as to what the outcome of that prior case was?" (Tr. P. 139). Detetive Bridgeman responded, "Guilty." (Tr. P. 130). On re-cross examination, Cunningham asked Detective Bridgeman whether he understood that the original decision had been overturned by this court. Detective Bridgeman responded, "Yes, that's why we're here today, sir."

(Tr. P. 144). Finally, on re-re-direct examination, the prosecutor asked Detective Bridgeman whether he knew the basis of the reversal, and Detective Bridgeman explained, "The only reason the case was reversed is because Mr. Cunningham was denied jury trial." (Tr. p. 145).

After the trial adjourned for lunch, the trial court raised the issue of the first trial with the parties. Cunningham moved for a mistrial. The trial court judge said that he would declare a mistrial if the jurors could not assure him that they would disregard the testimony regarding the first trial. He also admonished the prosecutor to "err on the side of caution" for the remainder of the trial. (Tr. p. 152). When the jurors returned from lunch, the trial court admonished them to disregard any evidence relating to the first trail, and each of the jurors agreed to do so. The jury entered a verdict against Cunningham and imposed a civil penalty of $225.

Cunningham now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

On appeal, Cunningham argues that: (1) the trial court violated his Fifth Amendment privilege against self-incrimination when it ordered him to submit to a deposition; (2) the trail court erred by ordering him to submit to a deposition after the discovery deadline; (3) the trial court abused its discretion in denying his motion for mistrial based on alleged prosecutorial misconduct; and (4) the

trial court violated Indiana Trial Rule 45(B) by granting the State's Motion to Limit the Scope of Discovery and for Protective Order.

I. *Self-Incrimination*

Cunningham first contends that the trial court violated his privilege against self-incrimination under the Fifth Amendment to the United States Constitution when it ordered him to submit to a deposition. The Fifth Amendment provides, in pertinent part, that no person "shall be compelled in any criminal case to be a witness against himself[.]" Under this provision, a witness is excused from answering a question, even in a non-criminal proceeding, "if the answer would tend to furnish one link in the chain of evidence necessary to convict him of a criminal charge." *In re Kefalidis*, 714 N.E.2d 243, 245 (Ind. Ct. App. 1999). Here, Cunningham has failed to direct us to any question he was forced to answer over a Fifth Amendment objective, let along any questions that could lead to a criminal prosecution. Therefore, we conclude that the trial court did not err in ordering Cunningham to submit to a deposition.

II. *Deposition after Discovery Deadline*

In addition to his Fifth Amendment claim, Cunningham also argues that the trial court erred by ordering him to submit to the deposition after the February 2nd, 2007, discovery deadline established in the court's Order on Proceedings of

November 9, 2006. While we acknowledge that Cunningham's deposition took place after the discovery deadline originally imposed by the trail court, we also not that "[t]rial courts are given wide discretion in discovery matters because they have the duty to promote the discovery of truth and to guide and control the proceedings." *Dye v.*

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2 On the final page of his brief, Cunningham includes a "Notification of 5th Amendment to the U.S. Constitution," which states:

> Defendant contends that the Trial Court is mandated to give Defendant the following rights before Trial. 1. The right to exercise his 5th Amendment to the U.S. Constitution right against self-incrimination. 2. The right to an appeal. 3. The right to an attorney and if the Defendant cannot afford an attorney then one will be appointed at no cost.

(Appellant's Br. p. 16). This "issue" does not appear in Cunningham's Statement of the Issues or his Summary of Argument, and we, like the State, are "at a loss to decipher what exactly [Cunningham's] claim is regarding those rights." (Appellee's Br. p. 15). To the extent that Cunningham seeks to raise additional issues with regard to his constitutional rights, he has waived them by failing to provide any cogent argument or citations to relevant authorities or the record on appeal. See Ind. Appellate Rule 46(A)(8)(a).

State, 717 N.E.2d 5, 11 (Ind. 1999), *reh'g denied, cert. denied* 531 U.S. 957 (2000). This necessarily includes the discretion to adjust deadlines or to make exceptions to deadlines. Here, the trial

court exercised its discretion in allowing the deposition after the discovery deadline, and Cunningham does not explain how that decision constitutes an abuse of discretion. Furthermore, "[t]o obtain reversal of a trial court's discovery order, the moving party must show prejudice." *Lucas v. Dorsey Corp.*, 609 N.E.2d 1191, 1195 (Ind. Ct. App. 1993), *trans.denied.* Cunningham fails to allege how he was prejudiced by the trial court's decision. He has not persuaded us that the trial court committed reversible error by ordering him to submit to a deposition after the February 2nd, 2007, discovery deadline.

II. *Prosecutortial Misconduct*

Cunningham asserts that the trial court abused its discretion in denying his motion for mistrial based on alleged misconduct by the prosecutor. We review such decisions under the deferential abuse of discretion standard because the trial court is in the best position to evaluate the relevant circumstances of an event and its impact on the jury. *Agilera v. State,* 862 N.E.2d 298, 307 (Ind. Ct. App. 2007), *trans. denied.* Cunningham's claim focuses on the fact that the prosecutor's line of questioning revealed to the jury that the trial court had entered judgment against Cunningham in the original trial in this cause. However, after the references to the original trial, the trial court admonished the prosecutor to err on the side of caution for the remainder of the trial and admonished the jurors to disregard any evidence

relating to the first trial. Each of the jurors agreed to do so. A Timely and accurate admonition to the prosecutor and the jury is presumed to cure any prosecutorial misconduct. *See Gamble v. State*, 831 N.E.2d 178, 184 (Ind. Ct. App. 2005), *trans. denied.* In his appeal, Cunningham has presented no argument that the trial court's admonition was insufficient to cure the alleged misconduct. As such, we cannot say that the trail court abused its discretion in denying Cunningham's motion for mistrial.

III. *Indiana Trail Rule 45(B)*

Finally, Cunningham contends that the trial court "made error in refusing to enforce Indiana Trial Rule 45(b)." (Appellant's Br. P. 7). Cunningham is apparently challenging the trial court's grant of the State's Motion to Limit the Scope of Discovery and for Protective Order, in which the State objected to Cunningham's request for the production of the radar device from Detective Bridgeman's car and certain documents relating to Detective Bridgeman's employment with the sheriff's department.

Indiana Trial Rule 45(B) allows a party filing a subpoena to request the production of "the books, papers, documents, or tangible things" designed in the subpoena. Subsection (B)(1) allows a court to "quash or modify the subpoena if it is unreasonable and oppressive[.]" The trial court did no in this case. On appeal, as the State notes,

Cunningham baldly asserts, without any analysis or citation to authority, that the requested materials "were discoverable and a matter of public record." (Appellee's Br. P. 14). Because Cunningham has failed to provide a cogent argument in this regard, he has waived the issue. *See* Ind. Appellate Rule 46(A)(8)(a).

CONCLUSION

Based on the foregoing, we conclude that the trial court did not violate Cunningham's Fifth Amendment privilege against self-incrimination by ordering him to submit to a deposition; that the trial court did not commit reversible error by ordering Cunningham to submit to a deposition after the discovery deadline; that the trial court did not abuse its discretion in denying Cunningham's motion for mistrial based on alleged prosecutorial misconduct; and that the trial court did not violate Indiana Trial Rule 45(B) by granting the State's Motion to Limit the Scope of Discovery and for Protective Order.

Affirmed

KIRSCH, J., and MAY, J., concur.

State of Indiana, County of Lake, State of Indiana, Plaintiff, v. Elliott Cunningham, Defendant.

Cause No. 45D10-0604-IF-1
Date of Entry: March 19, 2007

JUDGMENT

This matter was submitted to Trial by Jury on March 15, 2007. The Plaintiff, the State of Indiana, appeared by counsel, Deputy Prosecutor Jamise Perkins. The Defendant, Elliott Cunningham, appeared pro se. Evidence was presented to the jury and arguments of counsel were heard. After retiring to deliberate, the jury returned into open court with its verdict in favor of the Plaintiff, the State of Indiana, and against the Defendant, Elliott Cunningham. The Court now enters judgment on the verdict.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that Plaintiff, the State of Indiana, recover the sum of Two Hundred Twenty-five ($225.00) Dollars of and from the Defendant, Elliott Cunningham. Costs versus Defendant.

IT IS FURTHER ORDERED that Defendant pay the penalty of Judgment plus court costs into the Clerk's Office within **30 days** from the date of this Judgment.

SO ORDERED this 19th day of March, 2007.

s/

John R. Perra, Judge
Lake Superior Court
Civil Division, Room Six

Clerk, Supreme Court, Court of Appeals and Tax Court, Cunningham, Elliott v. State of Indiana

Cause Number: 45A03-0705-CV-00210 Lower Court Number: 45D100604IF1

You are hereby notified that the Supreme Court has on this day 5/15/08

This matter has come before the Indiana Supreme Court on a Petition to transfer jurisdiction following the issuance of a decision by the Court of Appeals. Any record on appeal that was submitted has been made available to the court for review, along with any and all briefs that may have been filed in the court of appeals and all the materials filed in connection with the request to transfer jurisdiction. Each participating member of the court has voted on the petition. Each participating member has had the opportunity to voice that justice's views on the case in conference with the other justices.

Being duly advised, the court now denies that appellant's petition to transfer of jurisdiction.

Randall T. Shepard, Chief Justice, all justices concur.

IN THE COURT OF APPEALS OF INDIANA

Elliott Cunningham, Appellant-Defendant, vs. State of Indiana, Appellee-Plaintiff. No. 45A04-0501-CR-4. Date of Entry: October 25, 2005.

Case Summary

Elliott Cunningham appeals the trial court's judgment finding that he committed speeding, a Class C infraction. We reverse and remand.

Issue

The dispositive issue we address is whether the trial court properly denied Cunningham's request for a jury trial.

Facts

The facts most favorable to the trial court's decision are that on October 26, 2004, Lake County Deputy Sheriff Robert Bridgeman observed a vehicle driving in excess of the speed limit. Deputy Bridgeman stopped the vehicle, which was driven by Cunningham, and issued him a Uniform Traffic Ticket.

On November 18, 2004, Cunningham filed three motions on his own behalf: a request for speedy trial, a request for discovery, and a request for jury trial. On December 7, 2004, Cunningham appeared, pro se, for a bench trial in this matter. At this time, Cunningham again requested a jury trial. The trial court denied his request. On

December 13, 2004, the trial court entered a decision in favor of the State and ordered Cunningham to pay fines and court costs in the amount of $96.50. This appeal ensued.

Analysis

Cunningham argues that the trial court violated his right to a jury trial in a civil case as protected by Article I, Section 20 of the Indiana Constitution. This provision provides: "In all civil cases, the right of trial by jury shall remain inviolate." Indiana Constitution, Art. I, § 20. An issue presented on appeal is a pure question of law when the question does not require reference to extrinsic evidence, inferences drawn from that evidence, or the consideration of credibility questions. Bader v. Johnson, 732 N.E.2d 1212, 1216 (Ind. 2000). We review purely legal issues de novo. LaRose v. State, 820 N.E.2d 727, 730 (Ind. Ct. App. 2005), trans. denied. This is such a question, and we review Cunningham's claim de novo. In doing so, we give no deference to a trial court's legal conclusions. Scalpelli v. State, 827 N.E.2d 1193, 827 (Ind. Ct. App. 2005), trans. denied.

On September 1, 1981, our legislature passed Indiana Code Sections 34-4-32-1 to 5 governing the procedures for enforcing violations of infractions and municipal ordinances. Wirgau v. State, 443 N.E.2d 327, 329, n.1 (Ind. Ct. App. 1982). Prior to the enactment of these statutes, all

traffic offenses were criminal in nature, but with the passage of the 1981 statutes, the legislature mandated that all such violations be governed by the Indiana Rules of Civil Procedure. Id. at 329. Indiana Code Chapter 34-28-5 governs these procedures, and Section 1 of that chapter provides: "Actions under this chapter . . . shall be conducted in accordance with the Indiana Rules of Trial Procedure . . . ." These rules govern the procedures to be followed in all civil suits brought in Indiana. Ind. Trial Rule 1. Our legislature removed the protections afforded to criminal defendants when it decided that the Indiana Rules of Trial Procedure govern infractions and, in doing so, directed that we now treat infractions as civil matters. Thus, this case is governed by Article I, Section 20 of the Indiana Constitution and not Article I, Section 19,1 which governs criminal cases.

The next, and thornier, question we address is whether Cunningham is entitled to a jury trial under Article I, Section 20. Our state Supreme Court has cautioned, "The right to a jury trial holds a special place in the system of justice, and we guard it against encroachment." Songer v. Civitas Bank, 771 N.E.2d 61, 63 (Ind. 2002). However, that right is not absolute. There exists long-standing precedent in Indiana providing that our constitution protects one's right to a jury trial only in actions where the right existed at common law. Id. Indiana Trial Rule 38(A) embodies the

well-settled tenet that a party is not entitled to a jury trial on equitable claims, and we look to that rule for further guidance. Id.

> Indiana Trial Rule 38(A) provides:
>
> Issues of law and issues of fact in causes that prior to the eighteenth day of June, 1852, were of exclusive equitable jurisdiction shall be tried by the court; issues of fact in all other causes shall be triable as the same are now triable. In case of the joinder of causes of action or defenses which, prior to said date, were of exclusive equitable jurisdiction with causes of action or defenses which, prior to said date, were designated as actions at law and triable by jury—the former shall be triable by the court, and the latter by a jury, unless waived; the trial of both may be at the same time or at different times, as the court may direct.

Indiana Trial Rule 39(A) further provides: "When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the chronological case summary

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[1] That section provides: "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." Ind. Const. Art. I, § 19.

as a as a jury action." (Emphasis added). The State does not dispute that Cunningham timely filed his request for jury trial in accordance with these rules.

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[2] While we recognize that this is merely a concurring opinion addressing an issue not treated by the majority, we find it significant that no other justice disagreed with Justice Boehm's instructive analysis. We further note that the State itself relies on this concurrence in its brief.

Justice Boehm recently supplied a thorough analysis of a party's right to a jury trial as provided by Article I, Section 20 and enforced through Indiana Trial Rule 38(A).2 Midwest Sec. Life Ins. Co. v. Stroup, 730 N.E.2d 163, 169-71 (Ind. 2000) (Boehm, J., concurring, in which Dickson, J., joins). Justice Boehm states, "If the cause of action existed on June 18, 1852, then this issue is decided by history." Id. at 169. Where the cause of action at issue was not in existence on this date, the crucial inquiry is whether the cause of action at issue is equitable or legal in nature as those terms were used in 1852. Id. at 169-70. The inquiry should not focus solely on whether the cause of action at issue existed at common law. Id. "If an action is essentially legal in nature, a jury demand must be honored." Id. at 169.

Clearly, the simplest way to determine whether a respondent has the right to a jury trial in a proceeding for a speeding infraction would be to look at the 1852 statutes governing speed zones. That approach is of little help here,

however, because the earliest versions of today's speed zone statutes were not codified until 1939. We must therefore proceed to the alternative path of analysis that Justice Boehm discusses: whether the cause of action at issue is equitable or legal in nature. We must determine whether an action for a traffic infraction would have been considered equitable had it existed in 1852. We hold that it would not have been an equitable action.

In making this determination, we note that, until 1981, an infraction was considered a criminal action and was not governed by what were then titled the Indiana Rules of Civil Procedure. Wirgau, 443 N.E.2d at 329, n.1. Prior to our legislature's 1981 enactment of Indiana Code Sections 34-4-32-1 to 5, trial courts were required to inform defendants in traffic cases of their criminal rights, including the right to a jury trial.3 Wirgau, 443, N.E.2d at 330. It is clear that from the time of their inception until 1981, when the Indiana Rules of Civil Procedure and, now, the Indiana Rules of Trial Procedure began to govern the enforcement of infraction violations, such offenses were criminal actions and, as such, were not equitable in nature.

Our case history provides long-standing support for this conclusion. In 1934, our Supreme Court stated,

> Since courts of equity deal only with civil and property rights, they will not interfere by injunction with criminal proceedings, having no jurisdiction or power to afford relief in such cases. . . . [E]quity will not

> interfere by injunction to restrain municipal officers from the prosecution of suits for the violation of city ordinances, such proceedings being of a quasi criminal nature, since equity will not interfere with the execution of the criminal law . . . .

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[2] At that time, Indiana Code Section 9-4-7-9(a), which was enacted in 1971 and repealed in 1980 provided: "'Before accepting a plea of guilty to a traffic offense other than parking, standing, or non-moving, the court shall inform the defendant of his rights, which shall include, but not be limited to, the right . . . [t]o a trial by jury . . . .'" Wirgau, 443 N.E.2d at 332, n. 1.

Lickey v. City of South Bend, 206 Ind. 636, 640, 190 N.E. 858, 860 (1934) (citation omitted).

We also note that Justice Boehm's concurrence provides us with an overview of some of those actions that were equitable in 1852, including injunctions, reformations, derivative actions, accounting, discovery, and land transactions. Midwest Sec. Life Ins. Co., 730 N.E.2d at 169 (citing inter alia Dean v. State ex rel Bd. of Med. Registration & Examination, 233 Ind. 25, 31-32, 116 N.E.2d 503, 507 (1954)). Justice Boehm's list of equitable actions does not include criminal proceedings. He further lists examples of those actions that were considered legal in 1852, including replevin, ejectment, fraudulent conveyance, and actions for money damages. Id. (citing inter alia City of Terre Haute v. Deckard, 243 Ind. 289, 293, 183 N.E.2d 815,

817 (1962)). Because a speeding infraction can result in a violator being ordered to pay a fine, an infraction is analogous to an action for money damages, a historically legal action, and dissimilar from equitable actions.

Though they are now governed by the Indiana Rules of Trial Procedure, speeding infractions remain quasi-criminal in nature[4]—they are enforced by the police; complaints are initiated and litigated by a prosecuting attorney on behalf of the State;[5] and violators

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[4] We recognize that the Indiana Supreme Court has clearly defined traffic violations as civil proceedings and not criminal offenses and do not mean to suggest otherwise. See State v. Hurst, 688 N.E.2d 402, 405 (Ind. 1997). In referring to speeding infractions as "quasi-criminal in nature," we are simply saying that the procedures through which these actions are adjudicated bear a likeness to those procedures employed in adjudicating criminal offenses.

[5] "An action to enforce a statute defining an infraction shall be brought in the name of the state of Indiana by the prosecuting attorney for the judicial circuit in which the infraction allegedly took place . . . ." Ind. Code § 34-28-5-1(a).

are fined by the government. Because of this, it logically follows that, just as criminal actions were outside the scope of equitable actions as provided by our case history, so, too, would quasi-criminal actions have been historically non equitable. Instead, in 1852, actions criminal in nature would necessarily have been legal. In such actions, a jury

trial demand must be honored. Midwest Sec. Life Ins. Co., 730 N.E.2d at 169. We therefore hold that the trial court improperly denied Cunningham's request for a jury in violation of Article I, Section 20 of the Indiana Constitution.[6]

Conclusion

The trial court improperly denied Cunningham's jury trial demand. We reverse and remand for further proceedings.

Reversed and remanded.

CRONE, J., and NAJAM, J., concur.

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[6] In his appellate brief Cunningham requested that we sanction the trial court, clerk of courts, and prosecutor involved in this case for various injustices that he perceived. We note that Article VII, Section 4 of the Indiana Constitution dictates that the Indiana Supreme Court shall have original jurisdiction over disciplinary issues. Therefore, we do not have the authority to address Cunningham's request for sanctions. Further, we need not address the other claims Cunningham asks us to review because we are reversing and remanding for further proceedings.